Filed 12/27/04 P. v. Rider CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. ANDRE WADE RIDER, Defendant and Appellant.	C044804 (Super. Ct. No. 98F06528)

A jury convicted defendant Andre Wade Rider of making criminal threats (Pen. Code, § 422; all unspecified statutory references are to the Penal Code), infliction of corporal injury on a spouse (§ 273.5), and attempted arson (§ 455) and found that he had two prior strike convictions. (See *People v. Rider* (Apr. 9, 2003, C037911) p. 1 [nonpub. opn.].) He was sentenced to three consecutive terms of 25 years to life and he appealed. (*Rider, supra,* C037911, p. 2.) We affirmed the convictions but vacated the sentence and remanded the matter for resentencing. (*Rider, supra,* C037911, p. 20.) On remand, defendant was

sentenced to a prison term of 50 years to life and, pursuant to section 296, was ordered to provide the Department of Corrections with blood, saliva, and thumb print samples.

Defendant has again appealed and contends that section 296 violates the Fourth Amendment because it mandates the nonconsensual seizure of blood from inmates for DNA profiling absent individualized suspicion of criminal activity. We disagree.

DISCUSSION

For the purpose of identification by law enforcement, section 296 requires all persons convicted of specified offenses to provide blood samples for inclusion in a DNA databank. (§§ 295, 295.1, 296.) Defendant's convictions for felony spousal abuse (§ 273.5) and attempted arson (§ 455) are specified offenses. (§ 296, subds. (a)(1)(D) & (a)(1)(L).)

In his opening brief defendant initially relied on *United States v. Kincade* (9th Cir. 2003) 345 F.3d 1095, which held that, in the absence of an individualized suspicion, the extraction of blood samples from a parolee cannot be justified by the special needs doctrine, and, therefore, such extraction constitutes an unreasonable search in violation of the Fourth Amendment. (*Id.* at pp. 1101-1104.)

However, defendant's reliance on *Kincade* was premature. The day defendant mailed his opening brief, the Ninth Circuit granted rehearing en banc in *Kincade*, thereby depriving that case of authoritative value. (*United States v. Kincade* (9th

Cir. 2004) 354 F.3d 1000.) Parenthetically, on August 18, 2004, the Ninth Circuit reversed the original opinion and held that forced blood extractions from parolees pursuant to the DNA Analysis Backlog Elimination Act of 2000 did not require individualized suspicion. (*United States v. Kincade* (9th Cir. 2004) 379 F.3d 813.)

Nevertheless, and in the face of contrary authority, defendant insists in his reply brief (which in fairness was filed before the en banc reversal) that, in the absence of an individualized suspicion, the nonconsensual extraction of blood from one convicted of a section 296 offense violates the Fourth Amendment. Notwithstanding that "DNA data base and data bank acts have been enacted in all 50 states as well as by the federal government" (*Alfaro v. Terhune* (2002) 98 Cal.App.4th 492, 505), defendant is unable to cite a single case supporting the general proposition that an individualized suspicion is required for those convicted of crimes the same as, or similar to, those set forth in section 296.

Directly on point, however, is *People v. Adams* (2004) 115 Cal.App.4th 243, wherein the defendant made the same claim as defendant makes here. The court responded: "The individuals who are required to give samples have been found guilty beyond a reasonable doubt of serious crimes such as murder, manslaughter, sexual offenses, assaults, and kidnapping (§ 296, subd. (a)(1)), either by trier of fact or by their own admission. One result of their crimes is that society has a vastly increased interest in their identities. 'The Fourth Amendment does not protect all

subjective expectations of privacy, but only those that society recognizes as "legitimate." [Citation.]' (*Vernonia School Dist. 47J v. Acton* (1995) 515 U.S. 646, 654 [132 L.Ed.2d 564].) 'By their commissions of a crime and subsequent convictions, persons such as appellant have forfeited any legitimate expectation of privacy in their identities. In short, any argument that Fourth Amendment privacy interests do not prohibit gathering information concerning identity from the person of one who has been convicted of a serious crime, or of retaining that information for crime enforcement purposes, is an argument that long ago was resolved in favor of the government.' ([*People v. King* (2000) 82 Cal.App.4th 1363, 1375, fn. omitted].)" (*Id.* at p. 259; in the federal context see *Rise v. State of Oregon* (9th Cir. 1995) 59 F.3d 1556, 1561 [upholding DNA testing for the law enforcement purpose of solving crimes].)

Finally, defendant's attempt to analogize the circumstances in *People v. Butler* (2003) 31 Cal.4th 1119, to those of the present circumstance fails. The statute at issue in *Butler* was section 1202.1 rather than section 296. There is a major difference. Section 1202.1, subdivision (e)(6)(A) requires blood samples be drawn from individuals convicted of specified sexual offenses, but only where there is "probable cause to believe that blood, semen, or any other bodily fluid capable of transmitting HIV has been transferred from the defendant to the victim." The issue in *Butler* was whether there was substantial evidence to support a finding of probable cause. (*Butler, supra,* 31 Cal.3d at p. 1126.) Since *Butler* arises under a

different statute and a different issue, the analogy defendant tries to draw cannot be sustained.

DISPOSITION

The judgment is affirmed.

HULL, J.

We concur:

SCOTLAND, P.J.

BUTZ, J.